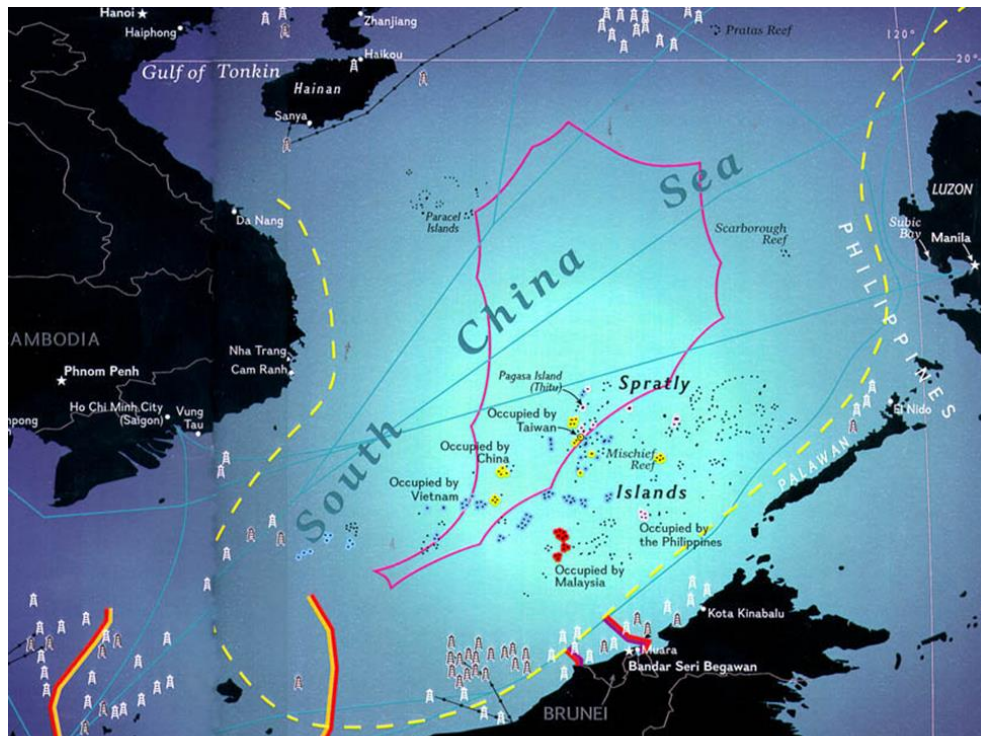


# Using International Law to Defuse Current Controversies in the South and East China Seas

Mark E. Rosen, JD, LL.M.

February 2015



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A handwritten signature in black ink that reads "Sherri Goodman".

Sherri Goodman  
Senior Vice President and General Counsel  
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# Introduction

The 1982 United Nations Convention on the Law of the Sea (UNCLOS<sup>1</sup>) serves as a comprehensive legal platform for allocation rights and responsibilities as world populations grow and greater stresses are placed on the world's seas for resources. More than 150 states signed this comprehensive document, which contains 320 articles and nine annexes, and covers virtually every aspect of the conduct of nations in the ocean environment.<sup>2</sup> Even though the United States has not yet ratified the convention, it has declared UNCLOS to reflect customary international law: U.S. policymakers reaffirm that the United States government regards the 1982 LOS Convention as “gospel” when it comes to the question of what is the law of the sea.

Yet UNCLOS is under assault from three fundamental stresses:

- The prevalence of “flags of convenience” registries, which allow cargo vessels to avoid labor and safety regulations by sailing under a flag state that has lax regulatory standards.
- The lack of enforcement mechanisms to prevent ships from transiting the maritime zones of coastal states for illegal or illicit purposes.
- Coastal states’ excessive maritime claims of sovereignty/jurisdiction over self-delimited maritime zones, and the reluctance of these states and contesting states to submit such claims to arbitration by UNCLOS tribunals.

This report will examine all three stresses on the public order of the oceans that UNCLOS was established to maintain. However, it is the third stress—the increasing prevalence of states to make and enforce excessive maritime claims—that will be examined in depth in this report. All three stresses are related in that they involve the putative enforcement mechanisms contained in UNCLOS, but excessive maritime claims of sovereignty/jurisdiction over coastal waters are highly destabilizing to the

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<sup>1</sup> Also commonly referred to as the Law of the Sea (LOS) Convention or the LOS Treaty.

<sup>2</sup> As of May 6, 2013, a total of 157 states had signed UNCLOS and 144 states had ratified the treaty, including amendments which went into force in 1996. The United States has signed the Agreement on Part XI of the LOS Convention, which amends the original Convention, but, as of this writing it has not ratified the Part XI Agreement.



public order of the oceans, and they have the greatest potential to precipitate conflict among maritime contestants that could directly implicate U.S. economic and political interests.

The stress of excessive maritime claims on the public order of the oceans is most evident in the South and East China Seas, where disputes among coastal states over maritime zone boundaries have led to several notable confrontations among naval and commercial ships over the years. Yet in a few cases, states have availed themselves of the legal institutional mechanisms provided by UNCLOS to arbitrate their conflicting claims regarding overlapping maritime zones. This report will look at these arbitral cases—involving Bangladesh, India, and Myanmar in the Indian Ocean’s Bay of Bengal—to see if the conditions for accepting arbitration and the positive outcomes in the arbitral decisions can apply to other, similar disputes in the neighboring South and East China Seas, principally between the People’s Republic of China (PRC) and the Philippines in the South China Sea, and between China, Japan, and other contesting coastal states in the East China Sea.

Following this introduction, the report begins with a background survey of UNCLOS and its institutional mechanisms for maintaining the public order of the oceans, and U.S. policy regarding UNCLOS. The second section surveys the three stresses on public order in the oceans and concludes with a discussion of why states are reluctant to arbitrate their ocean disputes—particularly, conflicts over maritime zone boundaries. The third section of the report is a brief survey of international law under UNCLOS and its institutional dispute-settlement mechanisms. Following this survey is a section analyzing the two maritime zone disputes in the Bay of Bengal—*Myanmar v. Bangladesh* and *India v. Bangladesh*—submitted to international tribunals for adjudication. The fifth section raises implications of the Bay of Bengal arbitrations for China’s maritime zone disputes with the Philippines in the South China Sea, and with Japan and other coastal states in the East China Sea. The report concludes with some thoughts about the viability of legal-normative approaches to managing public order in the oceans—particularly in the South and East China Seas, in light of China’s strategic political and economic goals.

# The Underpinnings of UNCLOS and U.S. Policy

Perhaps the greatest theorists on ocean governance—Professors Myres McDougal and William Burke— provided the basis for an effective system of ocean governance in their seminal *The Public Order of the Oceans* in 1962,<sup>3</sup> which postulated a number of key requirements:

- A body of complementary yet highly flexible prescriptions that accommodate the interests of coastal and noncoastal states
- An accommodation between states with exclusive resource rights and the general rights of the international community to use the seas as media for commerce and other peaceful purposes
- A recognition that some ocean resources lie beyond the scope of national jurisdiction, and that the exploitation of those resources cannot be limited to only those with the technology to acquire them
- The exclusive competence of states to confer their national character upon ships flying their flag
- A responsibility of states to manage their resources in an environmentally responsible manner, particularly when an incident within their borders has effects beyond those borders
- A process of “interaction,” in which states can make claims to certain interests, and those claims will be “authoritatively” endorsed or rejected.

The LOS Convention established new concepts, including that of a 200-nautical mile exclusive economic zone (EEZ) in which a coastal state would enjoy the right to harvest the living resources of the marine layer (principally fish) and the resources in

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<sup>3</sup> Myres S. McDougal and William T. Burke, *The Public Order of the Oceans* (New Haven: Yale University Press, 1962), chapter 1.

the seabed (principally hydrocarbons).<sup>4</sup> It also established important new institutions, including the International Seabed Authority, which licenses exploitation of marine resources in “the Area” (i.e., areas in the deep ocean which are beyond a coastal state’s claims), and the International Tribunal for the Law of the Sea (ITLOS). In establishing coterminous maritime zones—in which the resource rights of coastal states are delinked from the rights of the international community to those maritime areas for transit, overflight, and other recognized high-seas freedoms—the LOS Convention carefully balanced the rights of various competing interests. And, when those interests could not be balanced, the expectation is that states will use the LOS Convention’s dispute settlement mechanisms to settle their differences.

From the perspective of all of the various factions that were involved in the negotiation of the LOS Convention, the resulting document was a great success, even though the provisions dealing with deep seabed mining were initially deemed unsatisfactory by the United States. The United States has publicly declared that the 1982 LOS Convention is reflective of customary international law and has had a Freedom of Navigation Program in effect since 1983<sup>5</sup> to diplomatically and operationally contest excessive maritime claims. The U.S. has also declared a territorial sea and exclusive economic zone consistent with the LOS Convention’s norms and is an active participant in oceans governance at the International Maritime Organization (IMO). The United States has played an important thought-leadership role in oceans policy formulation and has supplied jurists to ITLOS and other arbitral tribunals, and has worked on a bilateral basis with a variety of countries to ensure faithful implementation of the LOS Convention. Examples include U.S. negotiations with Russia to establish guidelines on the drawing of straight baselines, consultations with Turkey concerning its administration of the Montreux Convention, and close coordination with Indonesia and the Philippines on those country’s establishment of archipelagic baselines and passage rules. Even though these efforts were not well publicized the effects are seen today and are proof that the U.S. federal agencies and ocean policy scholars outside of government are fully committed to the LOS Convention’s faithful implementation.

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<sup>4</sup> Technically, the right to minerals and other seabed resources is governed by Part VI of the LOS Convention, which codifies the right of a coastal state to establish a 200-nautical mile (n.mi.) continental shelf (from its coastline) that is subject to reduction in the case of an opposing state’s continental shelf, or expansion to a maximum breadth of 350 n.mi. if the so-called broad continental margin meets certain geological tests.

<sup>5</sup> See the U.S. Department of State’s “Maritime Security” page, <http://www.state.gov/e/oes/ocns/opa/maritimesecurity/>.

# Systemic Threats to Public Order at Sea

Unfortunately, the United States is not yet party to the LOS Convention, so it cannot participate in the convention's *full* implementation—especially the activities of its new institutions: ITLOS, the International Seabed Authority, and the Commission for the Limits of the Continental Shelf. While U.S. participation in these institutions is not an international guarantee of public order at sea, it stands to reason that had the United States been a full participant in the Convention's implementation from the beginning, some of the issues that will be discussed below would not have become manifest or would have been less pronounced. Regardless, there are four systemic issues that threaten the theoretical fabric of UNCLOS because of their global implications, and because they have the potential to undo the careful balances that are established in the LOS Convention between the rights of coastal states and maritime states:

- The continued proliferation of excessive maritime claims.
- The decline in the concept of flag state control.
- A permissive enforcement regime as it relates to the rights of warships to interdict and arrest offending vessels.
- A lack of commitment on the part of states to mediate their disputes.

These issues are interrelated; indeed, if states were resolutely committed to mediating their disputes in a prompt manner, then there would likely be avenues to address the preceding matters. But, failure to address these major issues will create a perception that the world community is walking away from the 1982 LOS Convention, and this may stymie the progressive development of other global instruments intended to regulate maritime activities that are derivative of the Convention. Similarly, perceptions that the LOS Convention is no longer authoritative could stymie the progressive development of regional fisheries agreements;

undermine current efforts to establish a comprehensive “Polar Code” for the Arctic,<sup>6</sup> or deal with acidification and other impacts of global climate change on the health of the oceans.

## Excessive Maritime Zone and Territorial Claims

In the period leading up to the negotiation of the 1982 LOS Convention, “excessive” maritime claims usually were in the form of excessive territorial sea claims. With the advent of different maritime zones in the LOS Convention, there are now many types of excessive claims, including the misuse of the authority to establish straight baselines, improper establishment of archipelagic baselines, requirements for prior notification or permission for shipping to pass through certain areas (including warships and vessels carrying certain types of cargo), restrictions on peaceful military activities in areas to which high-seas freedoms pertain, and the establishment of illegal security zones, such as those established by North Korea and Syria.<sup>7</sup> Of more immediate interest is the proliferation of claims to ocean territory that are derivative of claims of sovereignty over small patches of land in the ocean as we have witnessed in the South and East China Seas. China’s recent enactment of a vast Air Defense Identification Zone (ADIZ) in the East China Sea underscores the problem that excessive claims come in many different flavors and, from a strictly U.S. perspective, come from both competitors like China, and friends and allies like Japan and South Korea.

### Misuse of Straight and Archipelagic Baselines

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<sup>6</sup> The author is well aware of the current efforts at the IMO to coordinate a “Polar Code.” However, the Code (which is pending adoption) defers action on some of the most difficult related issues, including financial responsibility of ship owners for a ship that suffers a casualty or causes costly damage to the marine environment in Arctic waters. See Mark E. Rosen and Patricio Asfura-Heim, *Addressing the Gaps in Arctic Governance*. Arctic Security Initiative (Stanford, CA: Stanford University/Hoover Institution Press, 2013), <http://www.hoover.org/research/addressing-gaps-arctic-governance>.

<sup>7</sup> The Law of the Sea Convention (Art. 33) permits coastal states to establish 24 n.mi. contiguous zones in which a state may enforce its customs and its fiscal, immigration, and sanitation laws. Security is not among the stated rationales, although the practical effect of the establishment and enforcement of a proper contiguous zone will afford a coastal state enhanced security against illegal activities in and around its coastlines.

Well over 60 states claim straight baselines in delimiting their territorial seas and many of those claims are excessive, particularly in the case of Taiwan, China, and Vietnam.<sup>8</sup> Such claims exacerbate the disputes in the South China Sea, as well as restrict the ocean space that would otherwise be available for innocent passage and high-seas fishing. A separate but related issue is archipelagic claims for continental states. When China established its system of straight baselines in 1996, it drew a series of baselines that enclosed the Paracel Islands. Most recently, China drew archipelagic baselines in and around Hainan Island in 2012 to encompass its claims to the Diaoyu/Senkaku Islands.<sup>9</sup> The United States and other countries protested this action because the entitlement to establish archipelagic baselines is limited under Article 47 of the LOS Convention only to “a state constituted wholly by one or more archipelagoes and ... other islands.” These straight baselines are egregious because the land-to-water ratio in the area enclosed is far below the ratio that an archipelagic state must meet, and the base points for the archipelago are tiny rocks. Furthermore, the language of the claim does not recognize the rights of maritime states to transit in the area.

## China’s “Nine-Dash Line” Claim

“Historic waters” is the next category of excessive claims that are highly destabilizing. Even when compared to North Korea’s 50-nautical mile security zone—which has no support whatsoever in UNCLOS—China’s “Nine-Dash Line” (see Figure 1 claim to the entirety of the South China Sea is egregious, even though Chinese scholars and government officials vacillate on the question of whether it’s a claim or not.<sup>10</sup> China’s recent publication of a new map in June 2014 that encompasses 90

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<sup>8</sup> J. Ashley Roach and Robert W. Smith, *Excessive Maritime Claims*, 3d ed. (Boston: Brill, 2012), chapter 4.

<sup>9</sup> Discussed in J. Ashley Roach, “China’s Straight Baselines Claims: Senkaku (Diaoyu) Islands,” *ASIL Insights* 17, issue 7 (2013).

<sup>10</sup> Many political analysts have offered various explanations for this particular action by the Chinese. In the course of multiple meetings with Chinese legal and policy specialists on the Law of the Sea, scholars typically come away with the impression that there is no consensus within the Chinese government on the intent of proffering the map in public debates. Yet one thing is clear: In 2009, Vietnam made a submission to the UN Commission on the Limits of the Continental Shelf (CLCS). In response to that submission, China sent a letter to the UN Commission that attached an updated version of the Nine-Dash Line chart and made this statement: “China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof (see attached map). The above position is consistently held by the Chinese Government and is widely known by the international community.” Had this statement said something like “the government of China claims all of the land territories in the areas enclosed by the dashed lines and the appurtenant maritime zones (as allowed by the

percent of the South China Sea leaves little doubt that China has claims on the ocean space,<sup>11</sup> and likely was a reason why the U.S. Department of State published a detailed monograph that legally dismantled the legal underpinnings and legitimacy of the Chinese claim.<sup>12</sup> At best, international lawyers would generously characterize China's Nine-Dash Line claim as a noncompliant historic waters claim; however, it is pointless to debate what it is or what China truly intends. The salient facts are these: China has gone on record with the United Nations<sup>13</sup> using language that asserts a claim over ocean space that is not associated with land features, and it has used threats and naval force to exclude Philippine fisherman and Philippine oil and gas licenses from areas that are far beyond the land territories that it claims (i.e., areas beyond 12 nautical miles around Scarborough Shoal and the Reed Bank area on the Philippine continental shelf).<sup>14</sup>

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1982 Law of the Sea Convention),” China’s position would have been at least somewhat more tenable in international legal forums.

<sup>11</sup> “New Chinese Map Gives Greater Plan to South China Sea Claims,” Reuters, June 25, 2014, <http://www.reuters.com/article/2014/06/25/us-china-diplomacy-map-idUSKBN0F00OI20140625>: “This vertical map of China has important meaning for promoting citizens’ better understanding of ... maintaining (our) maritime rights and territorial integrity,’ an unnamed official with the map’s publishers told the newspaper.”

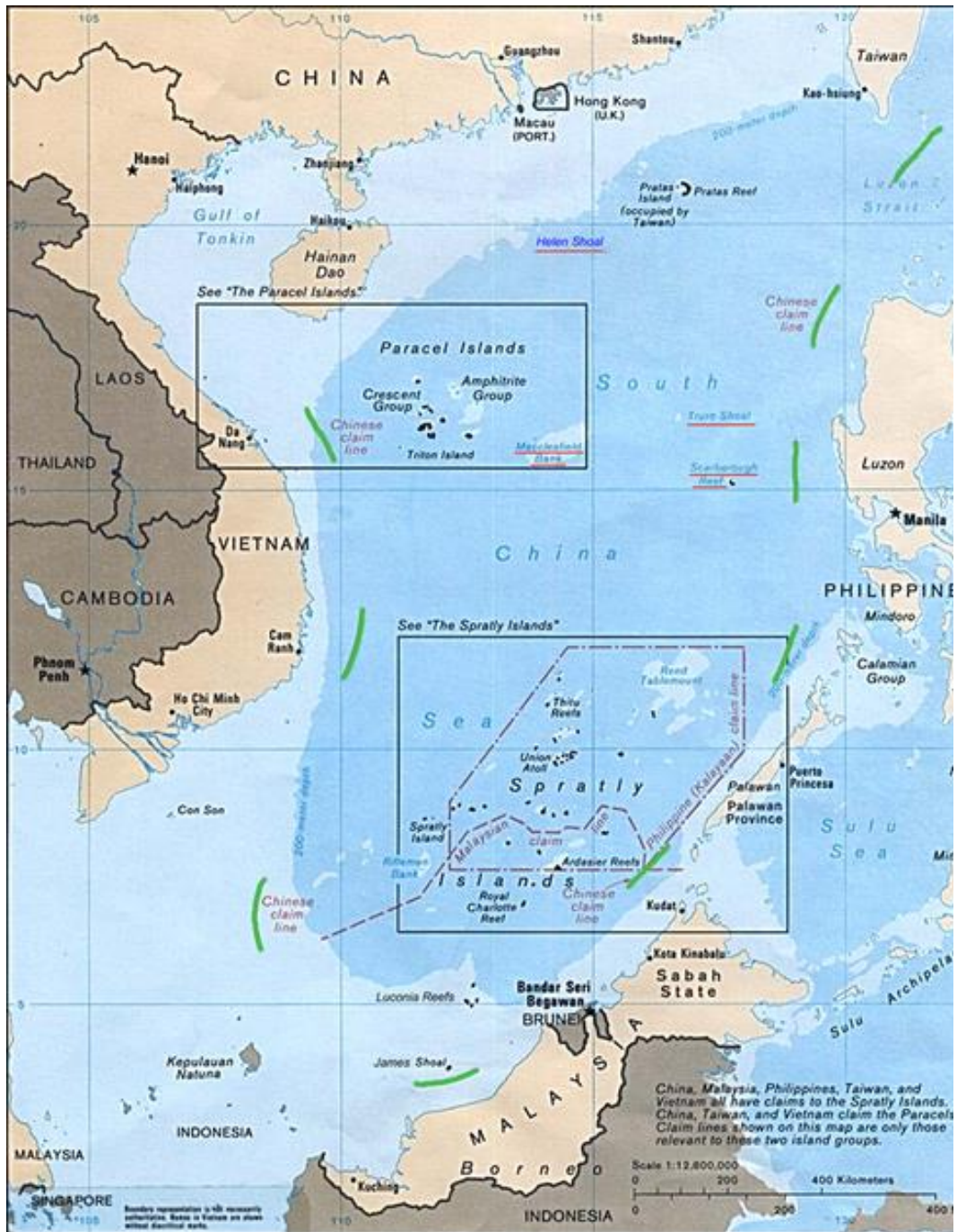
<sup>12</sup> See U.S. Department of State, Limits in the Seas, No. 143 (December 5, 2014), “China: Maritime Claims in the South China Sea,” <http://www.state.gov/documents/organization/234936.pdf>.

<sup>13</sup> Discussed in footnote 10.

<sup>14</sup> Mark Rosen, *Philippine Claims in the South China Sea*. CNA Occasional Paper (Alexandria, VA: CNA Analysis & Solutions, 2014), pp. 35–36 (and corresponding footnotes), [www.cna.org/sites/.../IOP-2014-U-008435.pdf](http://www.cna.org/sites/.../IOP-2014-U-008435.pdf).



Figure 1. China's "Nine-Dash Line"



Source: Courtesy of the University of Texas Libraries, University of Texas at Austin.



## Mid-Ocean Territorial Contests

The last category of “excessive” claims that undermine the overall integrity of the LOS Convention, and could be a major source of contemporary conflict, are claims to largely uninhabited oceanic territory (rocks, islands, shoals) that encompass large swaths of associated ocean territory. This problem is not confined to a single country. Given the fact that an inhabited island that otherwise meets the tests in Article 121 of the LOS Convention of being able to support “human habitation” or “economic life” of its own, and is able to legally generate the full panoply of maritime zones (including its own EEZ and continental shelf), it stands to reason that states would take a maximalist position when it comes to mid-ocean claims.

One stark example is Okinotorishima. This particular maritime feature has no fresh water and no vegetation; yet possession of it significantly helps enhance Japan’s claim to an EEZ and continental shelf adjacent to the Bonin Islands, which are nearly 863,000 kilometers—larger than the state of Alaska. An even more dangerous example of a mid-ocean territorial claim this is the Japan-China-Taiwan dispute over sovereignty of the Diaoyu/Senkaku Islands in the East China Sea. And, not to be undone, the South China Sea has literally hundreds of tiny islands, rocks, and low-tide elevations that are being occupied and improved by four main contestants (China, Taiwan, Vietnam, and the Philippines) to leverage large swaths of ocean space in areas that were previously uninhabited until well after World War II, when the prospects emerged of mineral, oil and gas, and fisheries resources.

A major impetus for the negotiation of the 1982 LOS Convention was the desire to stem the increase in excessive territorial sea claims, which, if unchecked, would lead to conflicts over passage rights and resources. Unfortunately, the drafters of the Convention did not anticipate the current developments in the South and East China Seas. The UNCLOS negotiators did not anticipate that major industrialized states like China, Japan, and South Korea would be at the forefront of making destabilizing claims to ocean territory or that they would make mid-ocean historic waters claims like the Nine-Dash Line claim, which has no support whatsoever in UNCLOS. Taken together, these claims can lead to conflict among the contestants and are also destabilizing because they may embolden other countries to make similar claims.

## **The Laissez-Faire Approach to Flag State Enforcement: The Flag of Convenience Problem**

The LOS Convention also recognizes the important legal principle of equality among states and the sovereignty of each state to regulate its own internal affairs—

including management of its flag vessels. In exchange for giving the flag state nearly exclusive jurisdiction over the activities onboard the vessel, the LOS Convention has a corresponding requirement, under Article 94.1, that a flag state must “effectively exercise its jurisdiction and control in administrative, technical, judicial, and social matters over ships flying its flag.” The principle of flag state control and enforcement is essential to ensure that LOS norms are upheld, because there are no international police forces or standing courts to cite ship-owners or rogue flag states with violations unless a vessel is caught “red handed” in the territorial waters of another state. Save for a few exceptional circumstances, the flag state will exercise exclusive enforcement and criminal jurisdiction over the activities aboard those ships while at sea.

As a method to evade the enforcement powers of flag states, avoid the higher marginal labor costs of licensed mariners, and minimize taxes, ship owners from developed countries have gravitated to flags of convenience (FOC) to lower their operating costs. FOC registration often means much lower costs for labor, fewer inspections, lower taxes, and less rigorous equipment standards. A 2003 study by the U.S. Maritime Administration found that these competitive cost advantages have prompted a decline in the national flag registries in developed countries to the point that FOC registries now account for over 50 percent of the world’s merchant fleet.

Malta, for example, is a leading FOC registry state for European ship owners, although flags from Panama, Liberia, the Marshall Islands, Cyprus, Antigua, and Barbuda are also in heavy use.<sup>15</sup> The current system of FOC registries has stimulated a “race to the bottom” among some flag FOC states in terms of costs of complying with current crewing and material requirements (i.e., capital flows to FOC countries that offer the lowest labor and regulatory costs). Profit margins in the operation of cargo ships are so slim that ship owners have no choice but to move to FOC registries to take advantage of less rigorous inspections and access to inexpensive seamen (rated and nonrated) from developing countries. Casualties are also higher among FOC vessels. The top 10 registries in terms of tonnage lost as a percentage of the fleet include five FOC registers: Cambodia (1st), St. Vincent (5th), Antigua (8th), Cyprus (9th), and Belize (10th).

The FOC problem also has a major security component because some governments allow persons to register ships anonymously and gain access to their flag in order to

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<sup>15</sup> See the “ISL Marketing Analysis 2005: Ownership patterns of the world merchant fleet” section in the Institute of Shipping Economics and Logistics’ *Shipping Statistics and Marketing Review* (April 2005), [http://www.isl.org/products\\_services/publications/pdf/COMM\\_4-2005-short.pdf](http://www.isl.org/products_services/publications/pdf/COMM_4-2005-short.pdf). See generally, <http://www.itfglobal.org/en/transport-sectors/seafarers/>, last accessed January 3, 2015.

transport everything from drugs to illegal immigrants. There is evidence that FOC registries were exploited by al Qaeda to transport supplies used to blow up the U.S. embassies in Kenya and Tanzania.<sup>16</sup> Ships registered by the Cambodia Shipping Corporation were found smuggling drugs and cigarettes in Europe, breaking the Iraq oil embargo, and engaging in human trafficking and prostitution in Europe and Asia.<sup>17</sup> Lastly, the FOC system is inherently corruptible and harms trade because it provides legal cover for unscrupulous ship owners to remain anonymous and use that anonymity to escape liability when things go wrong. When dangerous ships sink or pollute waters, the ship owner can hide behind the limited legal liability schemes or claim bankruptcy in FOC countries, some of which have dysfunctional legal systems.

The 1982 LOS Convention was one of the first multilateral instruments that imposed important duties on flag states to ensure that owners and operators of vessels use the seas in a manner that does not put the marine environment at risk. Coastal states have the limited authority to detain or seize vessels responsible for causing material or environmental damage in their waters, but the clear preference in the LOS Convention is for the unrestricted passage of military and non-military traffic through international straits, archipelagic waters, and foreign territorial seas. As a consequence, this situation puts great pressure on coastal states in congested areas (like straits) to enact unilateral claims in order to protect their marine resources and their coastal populations. Malaysia in particular has had to wrestle with the issues of ships carrying hazardous wastes close to its shores in the Strait of Malacca and has threatened unilateral action. Turkey had to enact rigorous transit requirements about a decade ago in the Turkish Straits to combat the problem of the proliferation of a large number of substandard oil tankers from Russia, Ukraine, and FOC countries transiting through the narrow Turkish straits. And, Russia has recently enacted arguably excessively restrictions on transits through its Northern Sea Route out of concerns that “outside” shipping would seek to transit its Arctic waters with substandard equipment or untrained crews. Even though these actions by coastal states are understandable, this unilateralism upsets the careful compromises that were struck in the 1982 LOS Convention between coastal countries and maritime states.

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<sup>16</sup> See, for example, “Brassed Off: How the War on Terrorism Could Change the Shape of Shipping,” *The Economist*, May 18, 2002, <http://www.economist.com/node/1136592>.

<sup>17</sup> See Robert Neff, “Flags that hide the dirty truth,” Asia Times Online (Korea section), April 20, 2007, <http://www.atimes.com/atimes/Korea/ID20Dg03.html>.

All FOC registries are not equal. Some ships with foreign registration are world-class platforms that conform to the highest standards of seaworthiness. Still, many “open registries” practice a completely hands-off approach in exchange for registration fees. The assumption that FOC registries are a costless business decision ignores how the practice upsets the careful balances in the LOS Convention between coastal and maritime states. The issue can and should be confronted.

## Weak Afloat Authorities: Legal No Man’s Land

There is a troubling gap between the goal of the LOS Convention—to have a permissive regime in which there are controlling international norms—and the reality at sea. Much of the blame for this gap can be attributed to the FOC issue. However, if enforcement authorities were stronger, it could enhance the ability of states to protect themselves harmful maritime activities. Weak enforcement, on the other hand, multiplies the threat to good order at sea.

Since September 11, 2001, some ships or cargoes have come under control of terrorists or associated support groups. The most notorious case was in March 2002, when it was widely reported that the Norwegian intelligence service had identified 23 ships that were under al Qaeda control. In July 2002, the Royal Canadian Navy captured suspected al Qaeda members operating a speedboat in the Gulf of Oman. This incident was followed in October 2002 by a small boat attack on the French supertanker *Limburg*, off the Yemeni coast by suspected terrorists. Then, in February 2004, the al Qaeda-linked Abu Sayyaf group bombed a superferry in Manila harbor, killing more than 100 passengers.<sup>18</sup> The Liberation Tigers of Tamil Eelam (LTTE) are reputed to have been involved in the hijacking of MV *Cordiality* in 1997, which resulted in the death of five Chinese crewmembers, and of MV *Farah* in 2007.<sup>19</sup> In 2010, the Japanese-flagged MV *Star*, a VLCC (very large crude carrier) oil tanker was rocked by an explosion from a small boat laden with explosives while it was at anchor in the United Arab Emirates; the attack was attributed to terrorists. Since 80–90 percent of global trade moves by container—and that trade is concentrated in a few “mega ports”—a single terrorist incident could have major impacts on the world economy if one of these mega ports had to go into lockdown because of an incident.

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<sup>18</sup> Barry Desker, *Protecting the Malacca Straits*. IDSS Commentaries (Singapore: Institute of Defense and Strategic Studies, March 3, 2005), <http://www3.ntu.edu.sg/rsis/publications/Perspective/IDSS102005.pdf>.

<sup>19</sup> A. Jayawardane, *Terrorism at Sea in South Asia* (Singapore: S. Rajaratnam School of International Studies, 2009), <http://www.rsis-ntsasia.org/activities/conventions/2009-singapore/Amal%20Jayawardane.pdf>.

Pirate attacks continue to pose dangers to crews, passengers, and coastal communities, especially now in the Gulf of Guinea. As a result of excellent international naval cooperation in the Strait of Malacca and Gulf of Aden, pirate incidents have declined, but sophisticated cross-border piratical syndicates continue to cause problems for enforcement officials. In the Gulf of Guinea, Nigeria is blocking collective enforcement arrangements against pirates and smugglers because of sovereignty concerns.

Of arguably greater concern is the more pervasive problem of traffickers (of weapons, drugs, and humans) on the high seas who use large commercial ships to hide their nefarious intent. The financial rewards are staggering: so-called “snakeheads” from mainland China earn between \$35,000 and \$80,000 per migrant. Reliable statistics are hard to come by, but a 2012 in-depth study into human smuggling by the United Nations Office on Drugs and Crime found many of the estimated 50 million illegal migrants per year were transported by sea, and that much of this activity was directed by organized criminal elements.<sup>20</sup> These smugglers are adaptable: to avoid detection and arrest, the ships crews have put their ships on autopilot after picking up their human cargoes and then sending them in the direction of Europe where Syrian refugees might find refuge.<sup>21</sup> Much of this likely occurs on FOC vessels because it provides smugglers a legal shield against enforcement, since there is no responsible flag state to conduct inspections or surveillance of the ships to ensure they are not involved in criminal conduct.

Law enforcement has few established remedies to board vessels to conduct at-sea inspections to determine whether the conduct is illegal, unless the flag state has given its advance consent. Very limited exceptions exist for warships to board vessels suspected of being without nationality or engaged in piracy; however, garden-variety smuggling is most often left to the jurisdiction of the flag state authorities. The same can also be said of the enforcement authority of warships or other flag

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<sup>20</sup> UN Office on Drugs and Crime, *Smuggling Migrants by Sea*. Issue Paper (Vienna: UNODC, 2011), [http://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Issue-Papers/Issue Paper - Smuggling of Migrants by Sea.pdf](http://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Issue-Papers/Issue_Paper_-_Smuggling_of_Migrants_by_Sea.pdf).

<sup>21</sup> Frances D' Emilio, “New Tactic: Smugglers Put Ships on Autopilot,” Associated Press, January 2, 2015, <http://abcnews.go.com/International/wireStory/italy-rescuing-migrants-mediterranean-27952248>. D'Emilio was reporting on the most recent incident in which ships flagged in Moldova and Sierra Leone were used to smuggle large numbers of migrants from mostly Syria to Italy's southern coast. When the ships were in range of the coastline, the crew set the ships on autopilot, forcing Coast Guard personnel to board the ships and take command to prevent the ships from becoming hazards to other shipping or from crashing into the shoreline. Migrants aboard the vessels paid between US\$2,000 to \$6,000 per passenger for passage from either Syria or Turkish ports to a European destination.

states to board, interdict, and arrest vessels that are involved in unlicensed fishing in foreign EEZs and the high seas.<sup>22</sup> No matter how irresponsible the captain or crew are, or how illicit the cargo is, warships have no power to stop, detain, or board vessels on the high seas if the vessel is legitimately registered in a particular flag state and that flag state acknowledges its registry and refuses permission to board. Likewise, involuntary repatriation of vessels (in the case of ships carrying illegal migrants) to the point of origin is not internationally mandated.

Major maritime states have sought to close some of the major enforcement gaps in the IMO by pushing for an expansion of the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA).<sup>23</sup> But substantially increased authority for responsible navies to do more—including the right to repatriate offenders to where they came, forfeiture rights, and trials at sea—is what is necessary to be able to address the deleterious impacts that result from criminal activity on the oceans. The problem is well known in Asia, where on any given day there is a substantial number of vessels that do not follow applicable IMO standards for manning or pollution control. Many ships at sea today do not comply with relevant fishing agreements, or are carrying illegitimate cargoes.

This confluence of factors has led, for example, to severe environmental decline in the water quality and fisheries in the South China Sea. Parola Island (Northeast Cay) in the Spratlys is a case in point. This very small island is not habitable because of

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<sup>22</sup> Because of the narrowly drawn definition of piracy in UNCLOS, the world's navies—especially those participating in the Proliferation Security Initiative (PSI) or in other counterpiracy operations—derive most of their enforcement powers on the high seas from either bilateral agreements or the right of visit codified in Article 110 of the LOS Convention. Article 110 has been broadened via the negotiation of agreements among U.S. and other flag states' enforcement authorities with a "limited power of attorney" to board their flag vessels without permission if those vessels are suspected of engaging in illicit drug trade (the most common) and, in some cases, migrant smuggling. This network of agreements is good, but the fact remains that actual consent by the flag state is a necessary ingredient unless a finding can be made that justifies boarding to verify nationality of a stateless vessel.

<sup>23</sup> <http://www.imo.org/About/Conventions/ListOfConventions/Pages/SUA-Treaties.aspx>. The Protocol to SUA was adopted in 2005 and entered into force on July 28, 2010. SUA was adopted by the IMO following the *Achille Lauro* incident and follows—in a very general sense—the same model as for the prosecution of war criminals: states in possession of a war criminal must either prosecute or extradite. Following 9/11, the IMO's Legal Committee began deliberating changes to SUA, which were then adopted in a new Protocol in 2005. Two notable changes are contained in the Protocol: A new offense was created under SUA to criminalize the unlawful international transport of weapons of mass destruction (WMD) aboard a ship, and a new provision authorizes any state encountering a ship suspected of carrying WMD to conduct an involuntary boarding and search of the vessel if the flag state gives permission or fails to respond to a boarding request within four hours. SUA continues to look to the flag state to apprehend or prosecute those guilty of criminal acts at sea or to extradite them.

high salinity in the ground water, and the reef has been destroyed because of the use of dynamite and cyanide fishing methods employed by “outside” fishing boats. A great deal of unregulated fishing and harvesting of sea turtles and other endangered species plague the disputed waters surrounding this desolate island. The UN Food and Agriculture Organization (FAO) office in Bangkok recently confirmed what is already common knowledge: the Asia-Pacific region continues to be the world’s largest producer of fisheries and fish consumers, even though the actual stocks in valuable fish species have declined precipitously.<sup>24</sup> Those involved in illegal activities frequently get a free pass because states continue to dispute jurisdiction (and the associated rights of fisheries enforcement) in these disputed waters and the maritime law enforcement officials stay on the sidelines because they do not wish to risk “force on force” contacts. Yet, countries like Vietnam, Indonesia, and the Philippines can ill afford to let this happen, since responsible management of the remaining ocean resources in the South China Sea is essential to sustain their populations and prevent new trends of mass migration by sea.

## States Are Not Arbitrating their Disputes

Disputes such as these—delimitation, navigation, and weak afloat authorities—in the South and East China Sea remain unresolved and a source of military and political friction. Yet the powers of enforcement and adjudication in the world’s maritime domain are weak and diffuse. The Philippines took a bold leap last year against China using the dispute settlement procedures set forth in Article 287 of UNCLOS. That provision allows states to seek mandatory arbitration of disputes that are not exempted from an arbitral panel/court’s jurisdiction under Article 298.<sup>25</sup> When China deposited its instruments of ratification with the UN Secretariat it indicated that it was excluding from the scope of its mandatory dispute settlement matters relating to “sea boundaries,” “military activities,” or matters under the jurisdiction of the UN Security Council.<sup>26</sup> The Philippines took the creative step of sidestepping these exclusions in its action against China by asking the tribunal to issue a legal opinion as to the legal character of the Nine-Dash Line claim, and whether certain specific features were to be classified as either totally submerged features or low-tide

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<sup>24</sup> Asia-Pacific Fishery Commission, *Regional Overview of Fisheries and Aquaculture in Asia and the Pacific 2012*. RAP Publication 2012/26 (Bangkok: FAO Regional Office for Asia and the Pacific, 2013), <http://www.fao.org/docrep/017/i3185e/i3185e00.pdf>.

<sup>25</sup> Article 287(3) is the “default” mechanism to be used for UNCLOS disputes if the parties do not elect the same type of dispute settlement process.

<sup>26</sup> [http://www.un.org/depts/los/convention\\_agreements/convention\\_declarations.htm](http://www.un.org/depts/los/convention_agreements/convention_declarations.htm).



elevations (i.e., and thereby not entitled to any adjacent maritime zone or a 12 n.mi. zone). The arbitral panel was not being asked to rule on the specifics of the Chinese claim; rather, whether such a claim can be made lawfully.<sup>27</sup> The case remains pending at the end of 2014; although there are reports that Vietnam may intervene in the arbitral action to protect its interest.<sup>28</sup>

It would be wrong to imply that the prompt resolution of disputes is something that modern states have always done. The United States, in particular, has a very mixed track record when it comes to international dispute resolution mechanisms. Following its loss in the *Nicaragua Mining Case* <sup>29</sup>, the United States withdrew from the International Court of Justice's (ICJ) compulsory jurisdiction in 1986 and in 2005-6 terminated its acceptance of the Court's jurisdiction over disputes arising under the Vienna Convention on Consular Relations.<sup>30</sup> The United States continues to

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<sup>27</sup> Even some Chinese scholars admit this shortcoming. Jin Yongming, director of the Shanghai Academy of Social Sciences' China Maritime Strategic Studies Center and research fellow at the academy's Institute of Legal Studies, acknowledges that China needs to be able to "rationally handle and deal with disputes involving ocean issues. These days, our country finds itself in an era of explosive ocean issues, a crucial time for dealing with ocean issues. . . ." Regarding the Philippines arbitration, Jin asserts that for "some of the items in the Philippines' submission for arbitration (such as the issues of defining islands and rocks, harm to freedom of navigation, and unilateral brute-force law enforcement), the [International Court of Justice] does indeed have jurisdiction. Therefore, our country should assert its own claims with regard to these items and, in particular, should clearly elaborate its standpoint with regard to the South China Sea [Nine-Dash] Line. Planning and arrangements for discussions on how China can utilize the law to resolve disputes involving ocean issues should also be accelerated." See Jin Yongming, "Changing the Cultural Sense of 'Yellow Earth' and Learning How to Manage and Plan the Oceans," *Shijie Zhishi* (Beijing), August 1, 2014. (I am indebted to my colleague Tom Bickford at CNA's China Studies program for sending me the article. *Shijie Zhishi* is a semimonthly journal published by the Chinese Ministry of Foreign Affairs' World Affairs publishing house that reports on current international issues.)

<sup>28</sup> The Vietnamese Ministry of Foreign Affairs issued a statement that it had asked the Permanent Court of Arbitration (PCA) in The Hague to take into account the interests of Vietnam in the case between the Philippines and China. While the author is of the view that a victory by the Philippines benefits mostly Vietnam (since the case would invalidate the Nine-Dash Line claim and Chinese occupation of low-tide and submerged features), there is no record on the PCA docket that Vietnam had actually made a filing.

<sup>29</sup> See 1986 ICJ 1. The tortuously reasoned judgment held essentially that the United States had been involved in the "unlawful use of force." The alleged violations included attacks on Nicaraguan facilities and naval vessels; the mining of Nicaraguan ports; the invasion of Nicaraguan air space; and the training, arming, equipping, financing, and supplying of forces (the "Contras"), and seeking to overthrow Nicaragua's Sandinista government.

<sup>30</sup> Sean D. Murphy, "The United States and the International Court of Justice: Coping with Antinomies," in Cesare Romano, ed., *The United States and International Courts and Tribunals* (New York: Cambridge University Press, 2008), [http://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=1902&context=faculty\\_publications](http://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=1902&context=faculty_publications).



remain outside of the International Criminal Court (ICC) in The Hague, even though it was actively involved in the ICC treaty's negotiation. By contrast, the United States is an active participant in cases brought before the World Trade Organization.

# International Law and Dispute Settlement

There are literally hundreds of territorial and boundary disputes that remain outstanding across the globe. This paper focuses on dispute settlement in a maritime context and, in particular, disputes within the province of Article 287 of UNCLOS. Sovereignty disputes are not easily addressed in a LOS context unless the parties specifically consent. However, the fact that a dispute is not readily subject to mandatory UNCLOS dispute settlement does not mean that states have a right to ignore the legitimate claims of other states or to fail to negotiate differences in good faith. Article 2 of UN Charter makes this international obligation clear:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

The LOS Convention is a subsidiary international agreement, but its preamble reaffirms these two principles. Its provisions on dispute settlement were intended to provide states a menu of options from which states could select, including two courts (ITLOS and the ICJ) and two types of arbitration—the default settings that would apply when states selected different forums for mandatory dispute settlement matters. And, even though adjudicating sovereignty over disputed territory is beyond the mandatory competence of the LOS forums, there is still a great deal of good work that LOS dispute settlement organizations could take to clear much of the “legal clutter” that stands in the way of solving some of the larger sovereignty disputes. The clever pleading in the *Philippines v. China* case is just one example; yet if taken to its full outcome, it will resolve the status of a number of ambiguous and troubling features of the South China Sea and the status of the Nine-Dash Line claim. But, there are other technical disputes are part of larger sovereignty disputes but could be subject. Some of them, and others, that could be the subject of mandatory dispute settlement include the following:

Adjudicating whether the Diaoyu/Senkaku Islands are legally classified as “rocks” (entitled to 12 n.mi.) or an island (under Article 121 of UNCLOS and thus entitled to a full 200 n.mi. EEZ and continental shelf).

Legally classifying all of the low-tide elevations (LTE) in the South China Sea that are currently being occupied. An LTE is a naturally formed area of land, surrounded by and above water but submerged at high tide. An LTE can be appropriated by a coastal state if it is “naturally” lying on the continental shelf of that coastal state. However, an LTE that lies wholly outside of the breadth of that coastal state’s territorial sea<sup>31</sup> shall “have no territorial sea of its own.” LTEs that are not associated with a continental shelf claim of coastal state are not capable of appropriation (sovereignty claims or occupation).<sup>32</sup>

Legally classifying submerged features that are currently in dispute. This would apply to Reed Bank/Reed Tablemount, which is claimed by China (inside of its Nine-Dash Line claim) and the Philippines.

Legally classifying Liancourt Rocks<sup>33</sup> in the Sea of Japan as either “rocks” (entitled to 12 n.mi.) or “121 islands” (entitled to full maritime zones).

Legally classifying Okinotorishima<sup>34</sup> in the Philippine Sea as a “rock” (entitled to 12 n.mi.) versus an island (under Article 121). Such classification would invalidate Japan’s current EEZ claims.

Legally determining whether China is able to establish archipelagic baselines around the Paracel and Senkaku Islands, despite the language in UNCLOS that only archipelagic states may establish archipelagic baselines.

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<sup>31</sup> UNCLOS, Article 13.2

<sup>32</sup> *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, ICJ Reports 2012, paras 26 and 50; <http://www.icj-cij.org/docket/files/124/17164.pdf>.

<sup>33</sup> Called Takeshima (in Japanese) and Dokdo (in Korean), these features are a small group of islets in the Sea of Japan. These rocks are valuable because of the associated fishing ground and possible natural gas deposits.

<sup>34</sup> Appropriately known as “Distant Bird Island” in Japanese.

Determining the status of the so-called Northwest Passage, which is a transit route through from the North Atlantic to the Arctic Sea among various Canadian Islands. The question would be whether the sea route is an international strait or internal waters.

Classification of the legal status of minor islands in the Spratlys—which are debatably not full-fledged islands under Article 121 of UNCLOS—including Itu Aba (Taiping) and Pagasa (Thitu) islands. Given the trend in recent case law including *The Serpent Island Case* (ICJ), *Nicaragua v. Columbia* (ICJ) and *Myanmar v. Bangladesh* (ITLOS) to award minor islands only a 12 n.mi. territorial sea to avoid “distortions” of the natural boundaries of continental countries, it remains an open question whether these two “islands” would be legally classified as islands given the disproportionate impact they would have on delimitation of maritime zones in the Spratlys—including the continental shelf claim of the Philippines.<sup>35</sup>

Issuing an advisory opinion as to the legality of states to register vessels in their state absent a “genuine link.”<sup>36</sup> This could be an action in the abstract (advisory opinion) or one regarding certain registries. The corollary of this would be that if registrations were deemed to be a sham, vessels flying their flags could be legally classified as “stateless vessels” and subject to involuntary boarding (and inspection) under Article 110 of UNCLOS and then assimilated to the enforcing state for enforcement purposes if illegal conduct is detected.<sup>37</sup> States purporting to issue sham flag credentials could also be banned from the International Maritime Organization.<sup>38</sup>

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<sup>35</sup> For a discussion of the recent case law on “minor” islands, see Rosen, *Philippine Claims in the South China Sea*.

<sup>36</sup> The requirement is set forth in Article 94 of UNCLOS, as well as customary international law. For an excellent analysis of this issue and the concept of flag state duties and the requirement of a genuine link, see N. Hosanne, *A Critical Analysis of Flag State Duties as Laid Down Under Article 94 of the 1982 United Nations Convention on the Law of the Sea* (United Nations: UN Division of Oceans Affairs and Law of the Sea, 2009), [www.un.org/depts.../hosanne\\_0910\\_mauritius.pdf](http://www.un.org/depts.../hosanne_0910_mauritius.pdf).

<sup>37</sup> See generally Joseph R. Brendel, “The Marijuana on the High Seas Act and Jurisdiction over Stateless Vessels,” *William & Mary Law Review* 25 (1983).

<sup>38</sup> The real bite of such an action would likely be taken by taxing authorities in the states where the beneficial owners reside. Such authorities could disregard the corporate form of the registry and tax the vessel as if it were registered in the state where the owner resides.

Determining the adjacent sea boundary in the Beaufort Sea between the United States and Canada.<sup>39</sup>

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<sup>39</sup> In order to get this dispute into court or arbitration it is most likely the parties would have to consent to the action being taken because the United States is not party to UNCLOS and cannot be compelled into a mandatory dispute settlement. Even assuming that the United States was party to UNCLOS, mandatory dispute settlement does not apply in cases in which a sea boundary is “finally settled in an arrangement between the parties.” It is unclear to the author whether the parties would claim that there is a binding international agreement already in effect.

## South Asia: A Legal Trailblazer?

The preceding list of *potential* disputes that could be taken to mandatory dispute settlement to advance the goal of public order at sea does not mean that states should be reticent about voluntary submission to dispute settlement of genuine sovereignty/boundary disputes. India, Bangladesh, and Myanmar recently decided to do just that—and by all accounts, the results have been favorable.

### The Cases

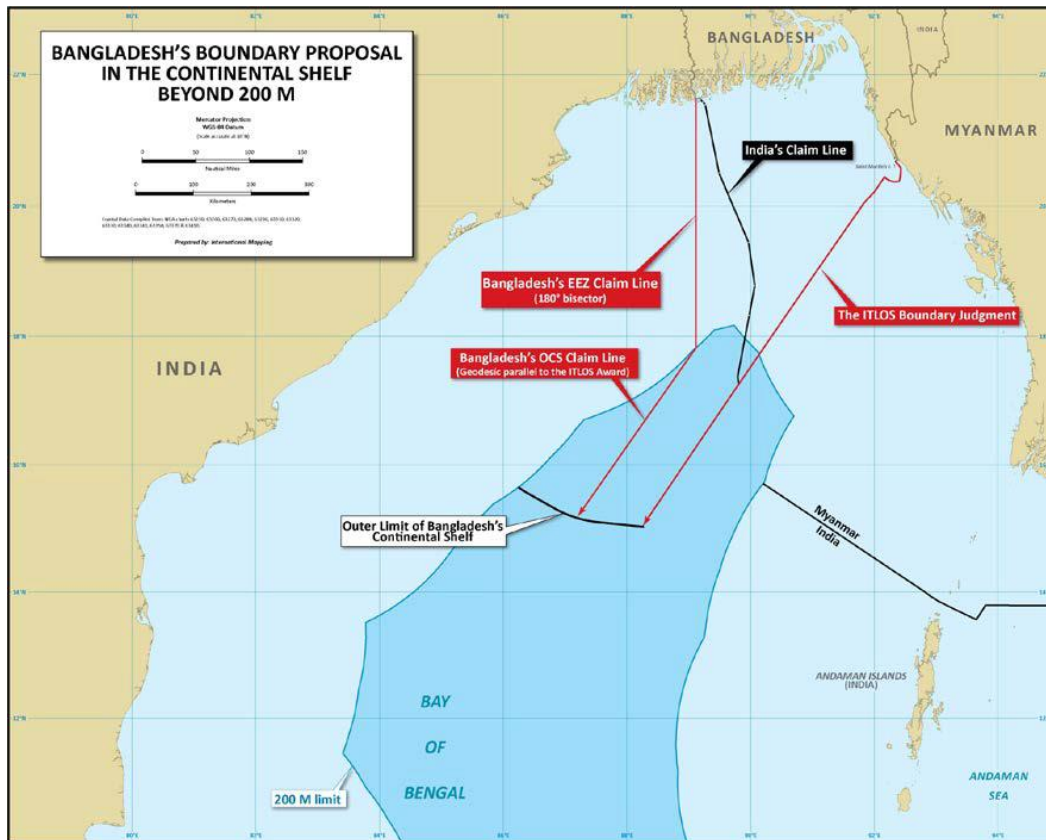
#### Myanmar v. Bangladesh

The Bay of Bengal has all the ingredients to become a highly contested maritime region—numerous islands, disputes over straight baselines, a highly irregular coastline dominated by the mouth of the Ganges/Meghna River estuary, overlapping continental shelves and EEZs, and commercially viable reserves of oil and gas. The Bay of Bengal cases are unique in that they were the first brought before the newly constituted International Law of the Sea Tribunal (ITLOS) in Hamburg, which adjudicated a comprehensive maritime boundary dispute between the overlapping continental and maritime zone claims of Myanmar and Bangladesh. There were serious economic and political consequences for both states in the event of an adverse decision, yet both states consented to the jurisdiction of the ITLOS to decide their overlapping maritime boundaries. By right, either country could have sought to exclude itself from ITLOS jurisdiction since, under Article 298 of UNCLOS, mandatory jurisdiction of the UNCLOS dispute settlement mechanisms does not require states to adjudicate sea boundary disputes. In this particular case, both countries elected to do so.

In this case, the ITLOS was asked to delimit three maritime boundaries between the two states: the territorial sea boundary; the single maritime boundary between the exclusive economic zones (EEZs) and continental shelves of the two states; and the boundary of the continental shelf (CS) beyond 200 miles from the parties' baselines. Myanmar and Bangladesh had attempted without success to resolve their differences via bilateral negotiations. In October 2009, Bangladesh instituted arbitral proceedings against Myanmar; however, in November both parties agreed to the case's adjudication by ITLOS. Figure 2 shows a rough depiction of the boundary

decision; however, an important component of the decision was in how to draw the boundary close to Myanmar's coastline and the effect that a large fringing island belonging to Bangladesh (St Martin's Island) would have on the delimitation task. In that decision, the court heavily discounted the effect that the island should have to avoid a distortion of Myanmar's EEZ/continental shelf.<sup>40</sup>

Figure 2. Bangladesh's Boundary Proposal in the Continental Shelf beyond 200 n.mi.



Source: Permanent Court of Arbitration, Bay of Bengal Maritime Boundary Arbitration between India and Bangladesh, Reply of Bangladesh, vol. I, Figure R5.7 (p. 145), <http://www.wx4all.net/pca/bd-in/Bangladesh's%20Reply%20Vol%20I.pdf>.

<sup>40</sup> For a complete description of the case, see Mark Rosen, *Myanmar v. Bangladesh: The Implications of the Case for the Bay of Bengal and Elsewhere* (Alexandria, VA: CNA, 2013), <http://www.cna.org/research/2013/myanmar-bangladesh>.

Media reporting of the decision indicated incorrectly that Bangladesh was the winner of the ITLOS case.<sup>41</sup> Yet a close analysis of the decision—and ITLOS’s decision to heavily discount the effect of St. Martin’s Island in determining the resulting boundary—reveal that Myanmar had a lot to be happy about. Had the Court determined that St. Martin’s Island (immediately in the vicinity of the origin point of the adjacent boundary between the two countries) be given full effect, it would have meant that the boundary would have gone in much more of a due-south direction. The effect would have been that Myanmar would have had much more of its coastline “boxed in” by the boundary with Bangladesh. This would have resulted in fewer resources that Myanmar could exploit, less sea space, and more restricted paths of ingress and egress into the Naaf River (which separates the two countries near the Myanmar coastal city of Maungdaw).

## India v. Bangladesh

In October 2009, Bangladesh instituted proceedings against both Myanmar and India pursuant to Annex VII of UNCLOS. As noted above, Myanmar and Bangladesh agreed to refer their case to ITLOS. As for the dispute between India and Bangladesh, each party appointed one member of the arbitral tribunal, and because they could not agree on the other arbitral members, the president of ITLOS appointed three additional members to the tribunal in February 2010. On 7 July 2014, the Permanent Court of Arbitration (PCA) at The Hague delivered its decision.

The gist of the case involved where to draw the north-south boundary line between the two countries delineating each country’s territorial sea, exclusive economic zone, and continental shelf. Heretofore, the parties were adhering to the provisional boundary that had been drawn the British. As can be seen in Figure 2, Bangladesh was seeking to get the boundary delimited in a due north-south direction that essentially follows the political boundary now separating the two countries (red line). India, on the other hand, was seeking to have the boundary pushed further east (black line), arguing that its proposed boundary was based on the equidistant method of boundary delimitation, in which the adjacent boundary line must reflect the contours of the coastline and other equitable features. Both countries also sought the arbitral panel’s guidance on whether India and Bangladesh were able to use

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<sup>41</sup> See, for example, W. Boot, “Sea Tribunal Ruling: Bangladesh’s Gain, Burma’s Paying,” *The Irrawaddy*, Mar 20, 2012, [http://www2.irrawaddy.org/article.php?art\\_id=23245](http://www2.irrawaddy.org/article.php?art_id=23245).



straight baselines to frame in their most seaward coastal islands and the correct origin points for delineation of a sea boundary using the equidistant method.<sup>42</sup>

The arbitral panel accepted the principle that straight baselines were appropriate as basepoints for calculating the equidistant line that separated the two countries. However, the panel did not accept all of the basepoints proposed by India, because it forced the boundary line too far east (resulting in a “cut-off” of Bangladesh’s EEZ projection).<sup>43</sup> Bangladesh also argued that the “cut-off” would deprive Bangladeshi fisherman access to fishing areas that they had fished for years and that were very important to their impoverished communities. In this regard the panel sided more with Bangladesh (Para 408) and adjusted the line further west. Another important factor the tribunal considered was the effects the boundary would have on the maritime zones of Myanmar (that were adjudicated a year earlier by ITLOS, see Figure 2) and the extended continental shelf claims that both India and Bangladesh were asserting.

In the end, the tribunal made substantial adjustments in the equidistant line (as depicted in Figure 3) and moved the boundary further west (black cross-hatched line). The majority of the tribunal compared the ratio of the relevant maritime space accorded to each state a boundary that was roughly equivalent to the ratio of the length of the states’ relevant coasts. In the end, the tribunal concluded that a strict equidistant approach did not work, and it adjusted the equidistant line until it met the Myanmar/Bangladesh maritime boundary established by the ITLOS decision in the Myanmar/Bangladesh case.<sup>44</sup>

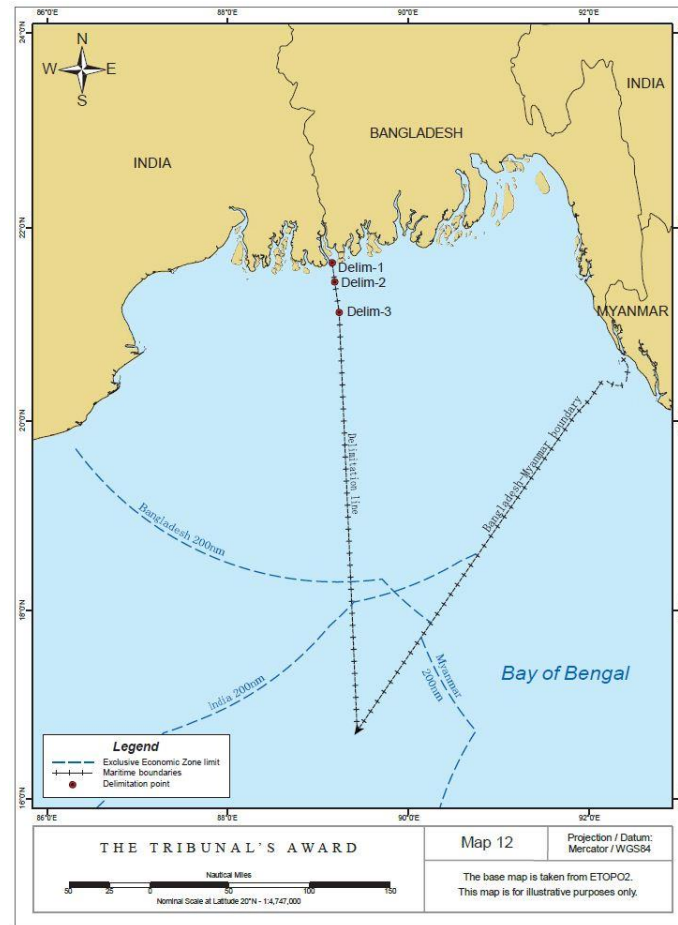
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<sup>42</sup> Under Article 7(2) of UNCLOS, a coastal state may use straight baselines to “smooth out” and encompass its legal shoreline if the coastline is unstable due to the presence of a delta or other natural conditions. That was unquestionably the case here, given the presence of the Ganges River delta. How the land border terminus was established by the PCA involved a lengthy discussion of past agreements dating back to colonial times and the associated maps that were produced.

<sup>43</sup> The cut-off effect was given legal effect in the *North Sea Continental Shelf Cases*. A major point of contention was New Moore Island, which had been claimed by both India and Bangladesh. India had made the case that the Radcliff Award fixes the boundary in this sector as the midstream of the main channel of the Hariabhanga and Raimangal Rivers until it meets the Bay of Bengal. On this basis, India argued that the Land Boundary Terminus should lie to the east of New Moore Island. Bangladesh argued that the Terminus should lie to the west of the island.

<sup>44</sup> The tribunal acknowledged that its ruling created a so-called “grey area,” where Bangladesh had a potential entitlement to the continental shelf, but not an EEZ, while India had a potential entitlement to both. The tribunal held that within the grey area, the boundary delimited only the parties’ sovereign rights in respect of the continental shelf and did not otherwise delimit India’s sovereign rights to the EEZ in the superjacent waters. The tribunal encouraged India and Bangladesh to conclude a cooperative arrangement respecting the management of the fisheries in the “grey zone areas.”

Figure 3. The Final Boundary



Source: Permanent Court of Arbitration, Bay of Bengal Maritime Boundary Arbitration between India and Bangladesh, Award, Map 12 (p. 163), [http://www.pca-cpa.org/showpage.asp?pag\\_id=1376](http://www.pca-cpa.org/showpage.asp?pag_id=1376)

It is telling that the some of the world's leading law of the sea experts (law professors and former foreign affairs ministry advisors, mostly from the West) were involved in the case: Professor W. Michael Reisman (Yale Law School), Paul Reichler (counsel for the Philippines in the current litigation against China), Michael Wood (formerly of the UK's Foreign and Commonwealth Office), Robert Smith (formerly of the U.S. Department of State), and a large number of naval professionals drawn from state hydrographic offices. The arbitrators included three ITLOS jurists and two highly experienced international lawyers with extensive diplomatic and arbitration experience.

## The Historic Context

Delimitation of these boundaries has not been without controversy.<sup>45</sup> In the case of the *India v. Bangladesh* matter, there have ongoing conflicts over fisheries, particularly involving traditional fisherman (bush fishing) who frequently operated outside of the law and licensed operators on both sides of the border.<sup>46</sup> Despite several high-level meetings since the 1970s, the two sides clashed in their interpretations of how the essentially north-south boundary line would be drawn. As demand for hydrocarbon resources increased and Bangladesh experienced setbacks in securing an extended continental shelf, resolution of the dispute became an imperative.

*Myanmar v. Bangladesh* has a similar history. Since 1973 there were persistent efforts to resolve the dispute, which encompassed nearly 2.2 million square kilometers of sea space. A couple of low-level informational agreements had been reached that proved to be legally unsustainable. There were also some minor military skirmishes in the vicinity of St. Martin's Island and the Naaf River over fishing rights. Most recently, on November 1, 2008, four drilling ships from Myanmar, escorted by two naval ships from the country, started exploration for hydrocarbon reserves southwest of St. Martin's Island—and within 50 nautical miles of Bangladesh. When three Bangladeshi naval ships went to challenge the flotilla, the Myanmar navy alleged that the Bangladeshi naval ships were trespassing. Myanmar vowed to continue with the exploration, but apparently the foreign oil company involved in the exploration wanted no part of the conflict and quietly went home.

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<sup>45</sup> O. Chattopadhyay, "International Tribunal's Verdict on India-Bangladesh Maritime Boundary: An Analysis," National Marine Foundation, July 10, 2014, <http://www.maritimeindia.org/Archives/International-Tribunal.html>.

<sup>46</sup> See generally N.D. Salayo, L. Garces, K.K. Viswanathan, and M. Ahmed, "Fish Fights over Fish Rights: Non-Traditional Security Issues in Fisheries in Southeast Asia," in R. Emmers, M. Caballero-Anthony, and A. Acharya, eds., *Studying Non-Traditional Security in Asia: Trends and Issues* (Singapore: Marshall Cavendish Academic, 2006).

## Postmortem on the Cases

### Myanmar v. Bangladesh

The media reporting on the outcome of the case and the “victor” has been somewhat erratic. Yet it has been uniform regarding the decision’s providing a legal pathway to development. Filing a dispatch from Dhaka for *Asia Times*, Syed Chowdhury writes:

The finding, which is final, ends a long-running maritime dispute with neighbor Myanmar and allows energy-starved Bangladesh to press forward with exploration for offshore hydrocarbon deposits. . . . “[W]e now have an opportunity to explore more prospective zones than the ones which are nearer to Bangladesh's coastline,” Hossain Mansur, chairman of state-owned energy company Petrobangla, told *Asia Times Online*.<sup>47</sup>

Chowdhury also indicates that the decision was a political victory for Bangladeshi prime minister Sheikh Hasina, who was trying to enable Dhaka to meet its long-term energy requirements without having to rely on foreign capital reserves. The decision gave Conoco-Phillips a green light to explore offshore tracts that had been leased to it by Bangladesh. Russia’s state-owned Gazprom is reportedly courting the Bangladesh Petroleum Exploration and Production Company (BAPEX) to carry out joint exploration in the Bay of Bengal<sup>48</sup> as a partial exchange for \$2 billion in loans that Bangladesh received from Russia to drill exploratory wells and build shore-based refineries.

Even though the Myanmar government has not been as effusive in its praise for the outcome of the case, the government has honored the ruling. As noted previously, Myanmar benefited from the tribunal’s treatment of St. Martin Island. Myanmar also received a substantial area in the Bay of Bengal, getting nearly 200,000 square kilometers against Bangladesh’s 111,000 square kilometers. Myanmar has been actively marketing its offshore resources, and is in the process of conducting auctions; according to media reports, Myanmar is having a boom year. Shell has bid for three blocks in partnership with Mitsui Oil of Japan, while ConocoPhillips of the

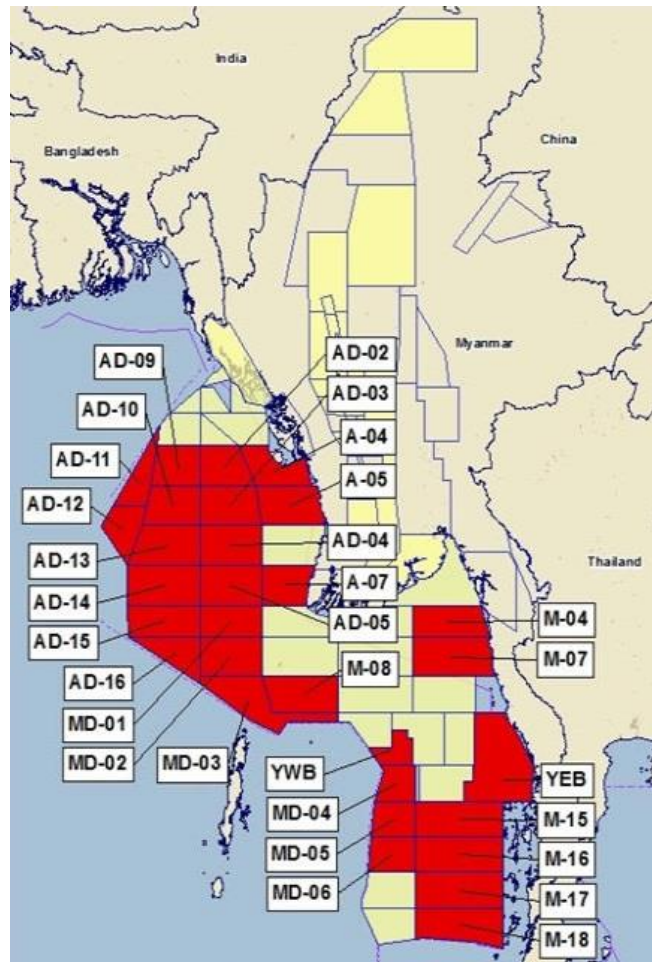
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<sup>47</sup> Syed Tashfin Chowdhury, “Bangladesh wins offshore claim against Myanmar,” *Asia Times Online*, March 20, 2012, [http://www.atimes.com/atimes/South\\_Asia/NC20Df05.html](http://www.atimes.com/atimes/South_Asia/NC20Df05.html).

<sup>48</sup> “Bay exploration deal signed: Bapex teams up with 2 foreign explorers; no provision for export,” *The Daily Star* (Dhaka), March 13, 2014, <http://www.thedailystar.net/bay-exploration-deal-signed-15330>.

United States has partnered with Norway's Statoil in two bids, according to Platts. Other notable bidders include Chevron, ExxonMobil, and Total.<sup>49</sup> The auction blocks appear in Figure 4.

Figure 4. Myanmar Offshore Oil and Gas Exploration Blocks



Source: <http://www.irrawaddy.org/business/2014-promises-boom-year-burmas-gas-oil-industry.html>

<sup>49</sup> W. Boot, "2014 Promises to Be a Boom Year for Burma's Gas and Oil Industry," The Irrawaddy.org., January 1, 2014, <http://www.irrawaddy.org/business/2014-promises-boom-year-burmas-gas-oil-industry.html>. "Myanmar to award offshore blocks in 2014, onshore acreage in Dec 2013," Platts, July 31, 2013, <http://www.platts.com/latest-news/natural-gas/singapore/myanmar-to-award-offshore-blocks-in-2014-onshore-27251698>.

From a global perspective, the establishment of clearly demarcated boundaries, enables Myanmar and Bangladesh to have unquestioned authority to manage the fisheries in the Bay of Bengal and the Ganges River delta (which, as is well known, is under assault from climate change and land-based sources of pollution, mostly from Bangladesh). Also, as ongoing talks between the two countries stalled in 2008, there was a series of naval confrontations over both sides' conducting seismic studies to test the other's resolve.<sup>50</sup> Thankfully, there was no direct conflict due to the diplomatic intervention of other states, but oil and gas prospecting essentially stopped. And, as is well documented, ecological management of the Ganges River delta to prevent overfishing was, at best, spotty. Since the ITLOS decision firmly established the southern boundary of Bangladesh's continental shelf, it is now in position to establish marine protected areas to shelter important estuaries, which are important to the fisheries in the bay in general. Marine scientists are currently debating how to get this done.<sup>51</sup>

## India v. Bangladesh

The reporting of the *India v. Bangladesh* decision has been uniformly positive on for both sides. "The award puts an end to a long-standing issue between India and Bangladesh which has impeded the ability of both countries to fully exploit the resources in that part of the Bay of Bengal," V. K. Singh, junior minister in India's Ministry of External Affairs, told lawmakers. "The peaceful settlement of this issue on the basis of international law symbolizes friendship, mutual understanding and goodwill between the two countries." "It is the victory of friendship and a win-win situation for the peoples of Bangladesh and India," Bangladesh's Foreign Minister Abul Hassan Mahmood Ali told a news conference shortly after the decision was

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<sup>50</sup> Abdul Kalam Azad, "Demarcation of the Maritime Boundary between Bangladesh and Myanmar: Politico-Security and Economic Implications" (paper presented at the German Institute for International and Security Studies' Seventh Berlin Conference on Asian Security, "Territorial Issues in Asia: Drivers, Instruments, Way Forward/Session II: Resources (Energy, Fishing) and Maritime Law," Berlin, July 1-2, 2013, [http://www.swp-berlin.org/fileadmin/contents/products/projekt\\_papiere/BCAS2013\\_Abul\\_Kalam\\_Azad.pdf](http://www.swp-berlin.org/fileadmin/contents/products/projekt_papiere/BCAS2013_Abul_Kalam_Azad.pdf)).

<sup>51</sup> Abdu Hossain, "Multidimensional Planning on Marine Protected Areas and Fisheries Management in Bangladesh," in *Ecosystem Approaches to the Management and Conservation of Fisheries and Marine Biodiversity in the Asia Region* (Bangkok: Mangroves for the Future, 2013), <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=25&ved=0CDMQFjAEQBQ&url=https%3A%2F%2Fwww.mangrovesforthefuture.org%2Fassets%2FRepository%2FDocuments%2FRegional-Fisheries-Symposium-Book-of-Abstracts.pdf&ei=tGtbVNzfErTfsASYyIG4Dg&usq=AFQjCNEdU9UM1SBf3GCvPCDdLiPQbEON3A&sig2=Q-gajxA8Md1CfTrttmhhzw&bvm=bv.78677474,d.cWc>.

announced. He added, “We commend India for its willingness to resolve this matter peacefully by legal means and for its acceptance of the tribunal’s judgment.”<sup>52</sup> Economically, of course, the resolution was a boon for both sides, since it opened the door for oil and gas exploration that previously had been closed because the boundary issue was not resolved.

Indeed, the cooperation has opened up access to energy exploration for India—and Bangladesh, which now accounts for less than significant amounts of proven gas in a country that, according to the U.S. Energy Information Administration, suffers from “acute” natural gas shortages and “rolling blackouts of electricity.”<sup>53</sup> By year’s end, Bangladesh plans to auction 18 oil and gas blocks in the Bay of Bengal, including 10 previously claimed by India. “This is a showcase judgment of how countries can reach an amicable agreement,” said S. Chandrasekharan, New Delhi-based director of the South Asia Analysis Group. There are also significant maritime security implications. Writing for the National Marine Foundation, Chattopadhyay asserts:

On the maritime security front, the verdict has been a win-win case for both the countries. In the recent years the northern Bay of Bengal has become a hub of piracy, illegal migration, human trafficking, smuggling, terrorism and other transnational crimes. The area’s proximity to the “Golden Triangle” has been a catalyst for transnational crimes like drug trafficking and human smuggling. Owing to the relatively low socio-economic conditions prevailing in Bangladesh, its populace have [sic] been lured to into these illegal activities. Due to the lingering maritime boundary dispute, India and Bangladesh were unable to undertake the necessary cooperative measures, thereby leading to a grave neglect of maritime security in the area. The verdict has now paved the way for developing bilateral ties on [the] maritime security front. Maritime Domain Awareness (MDA) is the most critical area for potential . . . cooperation. Now that their maritime boundary is delineated, the two countries could also constitute regular coordinated naval patrols along the common boundary to check illegal migration and illegal fishing. The verdict will thereby effectively serve as a harbinger of maritime security in the Bay of Bengal.<sup>54</sup>

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<sup>52</sup> Zachary Keck, “How South Asia Resolves Maritime Disputes,” *The Diplomat*, July 10, 2014, <http://www.thediplomat.com/2014/07/how-south-asia-resolves-maritime-disputes/>.

<sup>53</sup> U.S. Energy Information Administration, “Country Analysis Note: Bangladesh,” <http://www.eia.gov/countries/country-data.cfm?fips=bg>.

<sup>54</sup> Chattopadhyay, “International Tribunal’s Verdict.”



# The Implications of the Bay of Bengal Cases for China and Other Maritime Contestants

## U.S. Ocean Policy Goals

Even though the United States is regrettably not a party to the LOS Convention, it does not mean that all U.S. government officials and thought leaders are uncommitted to proper implementation of the treaty and use of the treaty's dispute settlement mechanisms. In 1983 President Reagan made this important statement in 1983 concerning the role of international law in ocean governance:

The United States has long been a leader in developing customary and conventional law of the sea. Our objectives have consistently been to provide a legal order that will, among other things, facilitate peaceful, international uses of the oceans and provide for equitable and effective management and conservation of marine resources. The United States also recognizes that all nations have an interest in these issues.<sup>55</sup>

Oceans policy makers in the U.S. have never deviated from this basic principle and it has direct implications in the context of Sino-American relations. Recent congressional testimony by Assistant Secretary of State Daniel Russel reaffirmed these basic principles:

We firmly oppose the use of intimidation, coercion or force to assert a territorial claim. Second, we do take a strong position that maritime claims must accord with customary international law. This means that all maritime claims must be derived from land features

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<sup>55</sup> "Statement on United States Ocean Policy," *Weekly Compilation of Presidential Documents*, March 10, 1983, p. 383, <http://www.reagan.utexas.edu/archives/speeches/1983/31083c.htm>.



and otherwise comport with the international law of the sea. So while we are not siding with one claimant against another, we certainly believe that claims in the South China Sea that are not derived from land features are fundamentally flawed. But at the same time we fully support the right of claimants to exercise rights they may have to avail themselves of peaceful dispute settlement mechanisms. The Philippines chose to exercise such a right last year with the filing of an arbitration case under the Law of the Sea Convention.<sup>56</sup>

It is naturally in the U.S. national interest to have international law play a moderating influence in the relations among states. Also, given the unique position of China as a permanent member of the UN Security Council with veto power, it is certainly in the U.S. interest to have China play a leadership role as it relates to the faithful implementation of international treaties such as the LOS Convention. China's use of international dispute settlement mechanisms would be a very positive step in taking leadership and would clearly be favorable from the standpoint of U.S. oceans policy.

## **Why the Bay of Bengal Cases Make Sense for China and Other Maritime Contestants**

In his study of the PRC military's national security worldview, Nan Li examines the People's Liberation Army's strategic discourse on sovereignty in the post-Mao era and describes how China views its territorial disputes with its neighbors as a matter of "national survival" (p. 26).<sup>57</sup> He reports that China, in particular, views the South China Sea as its "new frontier" because of its strategic location and its potential importance as a source of food and energy resources to supply the Chinese mainland. This "frontier" mentality has both an economic and a political component for China. Recent studies indicate how declining accessible resources will inevitably lead to conflict. China often figures centrally in these analyses because it has few resources in comparison with its burgeoning population and economic growth.

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<sup>56</sup> Statement by Daniel B. Russel, Assistant Secretary of State for East Asian and Pacific Affairs, before the House Committee on Foreign Affairs, Subcommittee on Asia and Pacific, February 5, 2014, <http://www.state.gov/p/eap/rls/rm/2014/02/221293.htm>.

<sup>57</sup> Nan Li, *From Revolutionary Internationalism to Conservative Nationalism: The Chinese Military's Discourse on National Security and Identity in the Post-Mao Era*. Peaceworks 39 (Washington, DC: United States Institute of Peace, May 2001).

Council on Foreign Relations Scholar Elizabeth Economy's *By All Means Necessary: How China's Resource Question Is Changing the World* chronicles China's worldwide quest for resources and examines its implications, especially in South America, Africa, and, to a certain extent, South Asia.<sup>58</sup> China became a net importer of oil and gas in 1993 (mostly from the Middle East), and current estimates are that China will import 79 percent of the oil it consumes (22 percent of the world's demand) by 2030.<sup>59</sup> Both Economy and Oystein Tunsio believe that China is pursuing its current strategies into disputed territories (including the Arctic) and laying claim to them because, while it does not have territorial ambitions per se, it is concerned that it will not enjoy *access* to resources to fuel its economy. As a consequence, using Tunsio's vernacular, China pursues a strategy of political and economic "hedging" to ensure that it has multiple potential sources of supply in case one venture does not succeed.

The difficulty with the broad-based hedging strategy is that it when it comes to the competing claims in the South China Sea, China was late to the game in terms of making claims to these territories, and it now sits on an assortment of low-tide elevations that have very little value in terms of maritime demarcation under international law.<sup>60</sup> China was also comparatively late in perfecting its claims to the Diaoyu/Senkaku Islands in the East China Sea vis-à-vis those of Japan, and it now finds itself at a disadvantage.

Based on the foregoing, it would seem that China has a number of strategic objectives:

- Be perceived as acting within the bounds of international law so that it will continue to enjoy access to the international political system and, perhaps more importantly, the international trading system.
- Preserve its continued access to vital energy and mineral resources as consistent with its national "hedging" policies.

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<sup>58</sup> Elizabeth C. Economy and Michael Levi, *By All Means Necessary: How China's Resource Question Is Changing the World* (New York: Oxford University Press, 2014).

<sup>59</sup> Oystein Tunsjo, *Security and Profit in China's Energy Policy: Hedging Against Risk* (New York: Columbia University Press, 2013).

<sup>60</sup> Rosen, Philippine Claims in the South China Sea. See also Raul (Pete) Pedrozo, *China versus Vietnam: An Analysis of the Competing Claims in the South China Sea*. CNA Occasional Paper (Arlington, VA: CNA, August 2014); J. Ashley Roach, *Malaysia and Brunei: An Analysis of Their Claims in the South China Sea*. CNA Occasional Paper (Arlington, VA: CNA, August 2014); and Michael McDevitt, *The South China Sea: Assessing U.S. Policy and Options for the Future*. CNA Occasional Paper (Arlington, VA: CNA, November 2014).

- Avoid the direct use of military force to maintain its access to “territory” and resources, because it jeopardizes its access to the international trading and political system.
- Not be perceived as internally weak.

## Giving International Law a Chance Is Not an Irrational Leap of Faith for China and Others

It is always better for situations to devolve like those in the Bay of Bengal when the parties decide to vest an impartial third party with authority to arbitrate their disputes. The use of a third party involves a certain amount of political risk when the initial decision is made to refer the case, but once the case is so vested, the day-to-day controversies associated with a bilateral negotiation is not present. Indeed, it is often the case that the political leader who makes the decision to refer a case to a third-party tribunal is not in power when the decision is reached, since these cases typically take a couple of years or more to fully brief, argue, and decide.

Another point worth noting is that ITLOS in particular is a relatively new court and has an interest in attracting states to its chambers. For this to happen, states need to have an assurance that the decisions will reflect a faithful rendition of the LOS Convention and other applicable international legal principles. Anyone with a formal legal education in oceans law and policy will attest to the stature and professionalism of the individuals who were involved in the Bay of Bengal cases.

Finally, the justices and arbitrators have an interest in upholding the norms of the LOS Convention. They understand the destabilizing trends and are likely to arrive at pragmatic decisions that states can live with, while at the same time uphold the norms of the convention. Hence, most decisions are not “all or nothing” for the simple reason that the courts understand that states’ political leaders must be able to find something positive in the judgment that they can offer to domestic constituencies.

As was demonstrated in the Serpent Island case—and, hopefully, in *Myanmar v. Bangladesh*—there is much more to be gained by countries taking a long-term view of international arbitration and adjudication. If leaders take such a view, a partial victory means that the areas no longer in dispute are ripe for development. The absence of “clear title” almost always means that investment capital will stay on the sidelines. In the end, it is better for a state to have a clean title to 50 acres than disputed title to 100 acres.

## Diaoyu/Senkaku

The Diaoyu/Senkaku dispute is especially well suited for a legal solution. The irony of the current contest between Japan and China over the Senkaku/Diaoyu Islands is that ownership of the islands is mostly irrelevant, except as they relate to the fisheries and hydrocarbons resources associated with the median line demarcation of the continental shelves are projected from China's mainland and Japan's Ryukyu Island Chain. (Until the 1970s these islets were not valued by any state until the prospects of oil and gas in the nearby waters emerged.) Given the high probability that a court would likely classify the uninhabited "islands" as "rocks" versus full-fledged islands, China would do well to propose to Japan that the parties agree to the classification of the features as rocks under Article 121 of UNCLOS. In exchange for that legal agreement by Japan, China would agree to conform its coastal straight baselines claims to those permitted by UNCLOS only.<sup>61</sup> As more fully delineated by the author, these two agreements to abide by UNCLOS would devalue the question of sovereignty over Diaoyu/Senkaku, which in the end would result in significant amounts of maritime space, whose resources the two countries could equally divide and exploit.<sup>62</sup> This solution would appear to meet all of China's objectives, since it is within the boundaries of international law, puts it in a positive political light, and assures conflict-free access to resources to which it does not now have a right to exploit.

If negotiations are not fruitful, China could file an action under UNCLOS Article 287 to have a third party legally classify the geographic features. Such an action would not totally eliminate the question of sovereignty, but it would substantially lessen the stakes for both sides and could pave the way to a joint agreement on the demarcation of their continental shelves. Such demarcation would enable exploration of the areas for oil and gas, and the establishment of effective regional fisheries management regimes.

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<sup>61</sup> Coastal states are supposed to draw only straight baselines when they have fringing islands closely associated with the coastline or a deeply indented coastline. In those cases, a straight baseline can "smooth out" the coast; Articles 1-11 and 13-14 of UNCLOS pertain. China meets none of those characteristics, and the U.S. Department of State, in its *Limits in the Seas*, No. 117 (July 9, 1996), went on record in refuting China's excessive straight baseline claims, which have the practical effect of appropriating significant amounts of ocean space in the East China Sea, since the straight baselines become a proxy for the geographic coast.

<sup>62</sup> Mark E. Rosen, "Fixing the Senkaku/Diaoyu Problem Once and for All," *The Diplomat*, December 19, 2014, <http://thediplomat.com/tag/senkaku-diaoyu-islands>.

## Philippines v. China claims

The application of UNCLOS and international legal precedents to the pending arbitration between the Philippines and China is another example of how legal principles can help to defuse seemingly irreconcilable differences. In past discussions with Chinese officials, the author has strongly advised the PRC to immediately enter into negotiations with the Philippines to avert a default judgment on the issues currently before the Permanent Court of Arbitration (PCA). Most impartial observers of the matters pending before the court believe that the Philippines will prevail on the almost all of the central questions—namely, the illegality of the Nine-Dash Line claim, the invalidity of China’s appropriation and occupation of low-tide elevations like Mischief Reef, and China’s illegal assertions of jurisdiction beyond 12 nautical miles for high-tide elevations like Scarborough Shoal.

As mentioned previously, the PRC is late to the game in making these claims, and it is in a disadvantaged position to shape the issues that are currently pending in the arbitration. A default judgment would surely be followed by a period of recrimination, in which China would be characterized as again standing outside of the reach of the law. This turn of events would frustrate all of the regional states—and the United States, of course, which provides treaty-based security guarantees to both the Philippines and Japan. An adverse judgment also does not put the PRC any closer to its aforementioned goals—above all, to secure access to its near-sea resources in a legally and politically acceptable manner.

Until very recently, the PRC was legally and politically boycotting the proceedings; however, that changed in December 7, 2014, when the Chinese Ministry of Foreign Affairs issued a detailed position paper on the arbitration.<sup>63</sup> Even though China did not join in the proceedings, its well-reasoned argumentation on why the Arbitration Panel did not have jurisdiction over the dispute was clearly a step in the right direction—at least in terms of demonstrating to the other South China Sea contestants, and to the world, that China was interested in playing within the bounds of the international legal system. As an appropriate next step, the PRC would do well to begin negotiations immediately with the Philippines on resource and access issues associated with Reed Bank and Scarborough Shoal. China can justify such a negotiation with reference to UNCLOS Articles 122–123, which pushes states that border semi-enclosed seas to enter into cooperative arrangements. Even though there is nothing mandatory about the semi-enclosed sea principles in UNCLOS, it does provide China a legal fig leaf to explain its actions to other contestants and its own domestic constituencies. Such a negotiation can also be predicated on other

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<sup>63</sup> [http://www.fmprc.gov.cn/mfa\\_eng/zxxx\\_662805/t1217147.shtml](http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml).

international instruments, such as the 1920 Spitzbergen (Svalbard) Treaty and the 1959 Antarctic Treaty, in which questions of sovereignty are delinked from rights to obtain resources on an equal basis with other states.

If the PRC were to agree to some limited form of joint development<sup>64</sup> for Reed Bank and Scarborough Shoal, the Philippines would probably be content to put most of the arbitration permanently on hold. One could envision that parties establishing a “settlement agreement” to abate the legal proceedings, in exchange for a basket of agreed principles and a legally binding commitment to negotiate remaining issues in good faith. Such a rapprochement would take off the table, for the time being, the volatile question of illegal settlements on submerged low-tide elevations. Since most of the PRC’s South China Sea “holdings” are low-tide elevations, an adverse decision on this particular question would logically mean that China would have to dismantle all of its outposts—including those not claimed by the Philippines. That question could easily wait for a time when all of the contestants—especially Vietnam—are at the table.

The arbitration also provides an excellent political off ramp for the PRC to quietly back-away from its Nine-Dash Line claim and reclassify it strictly as a claim only to land territories or as an aspirational concept. Recall the situation in the Bay of Bengal cases: the parties had become paralyzed in their ability to negotiate reasonable solutions to their boundary disputes. For that reason, referral to a third party took much of the heat off of the political leaders, who could not (due to the vagaries of their domestic constituencies) cut a deal that would allow them to escape fatal political damage. China knows full well that other states are furious about its Nine-Dash Line claim, and that it could eventually result in costly conflict or a trade war—something China does not appear to want. Also, many senior officials in China certainly know that the Nine-Dash Line claim over ocean space is illegal, yet finding a proper way to back off of its position has been politically elusive. The arbitration provides such an opportunity, since it enables China to concede its Nine-Dash line claim to secure an agreement with the Philippines to gain legal access to some of the

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<sup>64</sup> A joint development scheme for the areas surrounding Scarborough Shoal would leave questions of sovereignty unresolved. However, both countries would gain access to the rich fishing grounds. Since the area lies proximate to the Philippines and is inside of its EEZ, China would gain international applause if they respected Philippine rights to administer the deal and manage the 50/50 split of the fisheries in the area. Regarding Reed Bank which unquestionably lies on the Philippines continental shelf, an appropriate deal would allow the Chinese National Offshore Oil Company to technically develop the oil and gas resources with a Philippine partner. China would receive access rights to 50% of the resources to ship back to China, but it would pay royalties to the Philippines for the right to extract those resources. China would be entitled to realize 10-15% of the overall “take” for its technical assistance in developing the resources for the mutual benefit of both countries.

South China Sea's most promising resources. In terms of overall goals, China's participation in the arbitration process enables the country to demonstrate responsible leadership and respect for international law, and to gain title to some of the resources that it believes it must have to sustain its population and economic growth.

## Conclusion

McDougal and Burke envisioned a scheme of states' "mutual tolerance" of other states' activities in the oceans, coupled with "shared use of and shared competence over" the great common resources of the seas, and a rational system of handling problems stemming from the claims to and use of those resources.<sup>65</sup> Yet today it appears that we have reached the point where states are unwilling or unable to embrace the principles of "shared use" because of pressures from burgeoning population growth (especially in coastal areas) and its attendant demand for more food and energy resources, domestic political constituencies, and other issues.

The legal resolution of disputes in the oceans context is mostly an aspiration at present—certainly not a reality *tout court*—even though the dispute-resolution mechanisms of UNCLOS and general international legal precedents can solve some of the knottiest problems—including excessive maritime zone claims that intersect other contesting states sovereignty claims. These particular problems go beyond the the South and East China Seas. As former prime minister and foreign minister of Australia (a top trade partner with China) Kevin Rudd observes, "the core question is whether China will continue to work cooperatively within the current rules-based global order once it has acquired great power status or instead seek to reshape that order more in its own image. This remains an open question."<sup>66</sup> Nevertheless, we do have a few indications of what China *could* do if it were genuinely committed to (in Beijing's words) "peaceful development," "win-win," and a "harmonious world." And, the South and East China Seas are excellent places to begin work.

To be sure, China has not abandoned global institutions, but it is also an open question of whether China has even acknowledged the potential of UNCLOS's legal-normative institutionalism. On that score, the lessons of the Bay of Bengal cases—and the possible solutions in the China-Philippines arbitration—should not be lost on China. For China to continue on its current growth trajectory, it must realize that such growth is inextricably linked to increased access to oceans near and far for resources and transit. Regarding China's near oceans, UNCLOS offers a legal

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<sup>65</sup> McDougal and Burke, *The Public Order of the Oceans*, p. 1138.

<sup>66</sup> Kevin Rudd, "Beyond the Pivot: A New Road Map for U.S.-Chinese Relations," *Foreign Affairs*, March-April 2013, p. 11.



framework for “peaceful development” through arbitration and “cooperative arrangements” such as those for states in semi-enclosed seas under UNCLOS Articles 122–123. China’s embarking on a path that involves adherence to UNCLOS’s norms and playing within the dispute settlement system may result in some short-term setbacks concerning relatively small coral protuberances in the Spratly Islands. Yet in the end, that path will lead to assured dividends as they relate to China’s relations with its neighbors, “win-win” solutions in developing the resources of its near oceans in a relatively conflict-free environment, and its overall standing in the world as a responsible power.





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